IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.PADMANABHAN NAIR

FRIDAY, THE 24TH AUGUST 2007 / 2ND BHADRA 1929

AS.No. 556 of 1994()

OS.71/1992 of ADDL.SUB COURT, THALASSERY

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APPELLANTS/DEFENDANTS 7 & 8:

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1. N.K.KUNHI MUHAMMAD,S/O.KUNHALI, BITH MYMOON, CHATTUKAPPARA P.O., KOODALI, KANNUR 670 592.

2. KOODATHUMKANDY KADEEJA, D/O.KAMAL, -DO- -DO-

BY ADV. SRI.GOVINDH.K.BHARATHAN, N.MADHAVAN
SRI.K.R.BALASUBRAMANIAN

RESPONDENTS/PLAINTIFFS & DEFENDANTS 1 TO 6:

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1. KALARIKANDY KOUSALIYA, WIDOW OF KANNAN, RESIDING AT MANIYOOR AMSOM-DESOM-KOODALI, KANNUR DT.

2. KALARIKANDY SARASU, -DO- -DO-

3. KALARIKANDY AMBUJA, -DO- -DO-

4. KALARIKANDY PUSHPA, -DO- -DO-

5. KALARIKANDY SADANANDAN, -DO- -DO-

6. KALARIKANDY SARASWATHY, -DO- -DO-

7. KALARIKANDY JAYASREE, -DO- -DO-

8. KALARIKANDY GANGADHARAN, -DO- -DO-

9. CHANDRATHIL KUMARAN, S/O.KUNHAPPA, MANIYOOR DESOM, KOODALI, CANNANORE DISTRICT.

10. CHANDRATHIL CHEERU (DIED) -DO- -DO-

11. CHANDRATHIL PADMINI, -DO- -DO-

12. CHANDRATHIL BHARATHAN, -DO- -DO-

13. CHANDRATHIL KRISHNAN, -DO- -DO-

14. CHELORAKANDY KADARKUTTY MUSALIAR,
KADATHOTHU HOUSE, MANIYOOR AMSOM DESOM,
P.O.CHEKKIKALAM, KOODALI.

R1 TO R8 BY ADV. SMT.VIDHYA. A.C
R9 BY ADV. SRI.SIBY MATHEW

THIS APPEAL SUITS HAVING BEEN FINALLY HEARD ON 24/08/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K. PADMANABHAN NAIR ,J

A.S.No.556 of 1994

Dated, this the 24th day of August, 2007

JUDGMENT

Defendants 7 and 8 in O.S.No.71/1992 on the file of the Subordinate Judge's Court, Tellicherry are the appellants. Appeal is filed against the preliminary decree and judgment passed by the court below for partition of 1/9 share of the plaintiffs.

2. In the plaint it was averred that item No.1 in the suit properties belonged to deceased Gopalan, Kannan @ Ramachandran and their mother Manni as per kuzhikanam deed No.2081/26. It was averred that subsequently they had obtained jenm right also. Item Nos. 2 and 3 originally belonged to one Kunhappa, the father of defendants 1 and 2 and grandfather of the plaintiff. He sold his right over those two items to defendants 1 and 2 and to Gopalan and they were in joint possession of those items. It was averred that right over item No.1 devolved upon defendants 1 and 2, Gopalan and Kannan. Kannan assigned his right over item No.1 to others and remaining property was in the joint possession of defendants 1 and 2 and deceased Gopalan. Gopalan died as a bachelor and issueless after 1956. So his one third right over the entire properties devolved upon defendants 1 and 2 and Kannan @ Ramachandran who was the predecessor-in-interest of the plaintiff. It was averred that from that date onwards Kannan @ Ramachandran and defendants 1 and 2 were in joint possession of the properties.

It was averred that Kannan died in the year 1967 and his one nineth share devolved upon the plaintiffs who are his widow and children and they are in joint possession of the properties with the defendants. It was averred that a portion of the property was acquired and one nineth of the compensation awarded was given to the plaintiffs. It was averred that the plaintiffs issued a notice on 10.3.1991 and first defendant issued a reply notice raising false and untenable contentions. Hence the suit for partition of one nineth share of item Nos. 1 to 3.

3. First defendant filed a written statement denying the right of the plaintiffs. It was contended that item No.2 exclusively belonged to him. It was contended that item Nos.2 and 3 belonged to their father who sold the same to defendants1 and 2 and deceased Gopalan. It was contended that Gopalan died and his right devolved upon defendants 1 and 2 alone and they were in exclusive possession of the property and they entered into oral partition and was in possession of specific plots. It was also contended that second defendant sold her one half right over item No.3 to Kaderkutty Musaliar under sale deed No.1538/62 and subsequently a partition deed was also effected in the year 1963 and alienee was in absolute and exclusive possession of the property allotted to him under the partition deed. It was also contended that the first defendant obtained a purchase certificate from the Land Tribunal in O.A.No.16/1980. It was contended that Gopalan died on 19.3.1934. It was also contended that first defendant was in exclusive possession of 98 cents of property and remaining 98 cents was in the

possession of Kaderkutty Musaliar. It was contended that even if the plaintiffs had any right or title the same was lost by adverse possession and limitation. It was also contended that Kaderkutty Musaliar was also a necessary party to the suit and he was to be impleaded as a defendant in the suit.

4. Subsequently second defendant died and her legal heirs, defendants 3 to 5 filed a separate written statement. It was contended that the predecessor-in-interest of the plaintiffs released whatever right he had over item No.1 and thereafter he had no right over item No.1. It was also contended that Gopalan died prior to 1956 and the plaintiffs have no right over item No.1. It was contended that the mother of defendants 3 to 5 had one half right over item No.3 and she sold that right to Kaderkutty Musaliar. Kaderkutty Musaliar was in exclusive possession over the same and plaintiffs were not entitled to get any share.

5. Subsequently defendants 6 to 8 were impleaded. Sixth respondent filed a separate written statement contending that one half right over item No.3 belonged to Cheeru alone and she sold the same to sixth defendant in the year 1962 and thereafter he entered into a partition with the first defendant and he was in absolute possession and enjoyment of the property from that date onwards. It was also contended that he assigned his right to defendants 7 and 8 and they were in exclusive possession of the property and over that property no other person has any right. It was contended that after 1963 there was no joint possession and from 1963 onwards sixth defendant was in exclusive possession of

the western plot of the property. Even if the plaintiffs had any right over the property the same was lost by adverse possession and limitation. It was contended that plaintiffs were not entitled to get any share.

6. Defendants 7 and 8 filed a separate written statement contending that they purchased 75 cents of property in the year 1978. It was contended that they are in exclusive possession of the same as their own property and no other person has any right over the property and that property was not available for partition. They also contended that even if the plaintiffs had any right that was lost by adverse possession and limitation.

7. Trial court found that plaintiffs were entitled to one nineth share and passed a preliminary decree to that effect. Challenging that preliminary decree and judgment so far as it relates to item No.3 alone this appeal is filed.

8. The only point arising for consideration is whether the finding of the court below that the plaintiffs are entitled to get one nineth share in item No.3 was also legal and proper. Evidence in this case shows that the properties originally belonged to Kunhappa. He had three sons, by name Kumaran, Gopalan and Kannan @ Ramachandran and a daughter by name Cheeru. He assigned his right over item No.3 to Kumaran, Gopalan, Kannan @ Ramachandran and Cheeru on 13.1.1933. The case of the plaintiffs was that one of the assignees under Ext.A2 died and his one third right devolved upon defendants 1 and 2 and Kannan @ Ramachandran and hence Kannan @ Ramachandran was entitled to get one nineth

share. It was also contended that Kannan @ Ramachandran died in the year 1967. That right claimed by the plaintiffs was denied by the contesting defendants 6 to 8. In view of the contention of the contesting defendants issue No.8 was raised as to whether the right, title and interest of plaintiffs were lost by adverse possession and limitation. Trial court considered issue Nos.1, 3 and 8 together. Trial court discussed the legal position regarding the plea of adverse possession between co-owners. But the trial court did not consider whether the evidence adduced in this case is sufficient to establish the claim of adverse possession.

9. Learned counsel appearing for the appellants placed reliance on Exts.B6 to B8. Ext.B8 is a sale deed executed by second defendant Cheeru in favour of Kaderkutty Musaliar on15.10.1962. It is argued that there was assertion in that document itself that after the death of Gopalan his rights were enjoyed only by defendants 1 and 2 and executants were having one half right. It is also argued that after taking that document Kaderkutty Musaliar and first defendant entered into Ext.B9 partition on 5.6.1963 and thereafter the sixth defendant was in exclusive possession of a specific plot. It was contended that thereafter he sold the property to strangers who in turn sold and ultimately the properties were purchased by the appellants. Defendants 6 and 7 gave oral evidence as DWs 3 and 2. Court below had not considered the oral evidence adduced by the parties and the documentary evidence produced. So I have no other option but to set aside the decree and judgment passed by the court below in

respect of item No.3 alone and remand the case for consideration of the contention of defendants 6 to 8 that item No.3 is not available for partition.

In the result, appeal is allowed in part. Preliminary decree and judgment passed by the court below in respect of item No.3 alone is hereby set aside. The matter is remanded to the court below for considering the question whether the plaintiffs had any subsisting right over item No.3 and whether the contention of defendants 6 to 8 that plaintiffs' right over item No.3 is lost by adverse possession and limitation is established. Parties shall appear before the court below on 8.10.2007.

K. PADMANABHAN NAIR
JUDGE

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K.PADMANABHAN NAIR, J.

A.S.No.556 of 1994

JUDGMENT

24th August, 2007.